

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OCTOBER TERM, 1891.

NO. 52.

NORTHERN PACIFIC RAILROAD COMPANY,

Appellant,

vs.

C. W. CANNON, *et al.*,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR
THE DISTRICT OF MONTANA.

Filed 1892.

FILED
MAY 6 - 1892



United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.
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NO....

NORTHERN PACIFIC RAILROAD COMPANY,

Appellant,

v's.

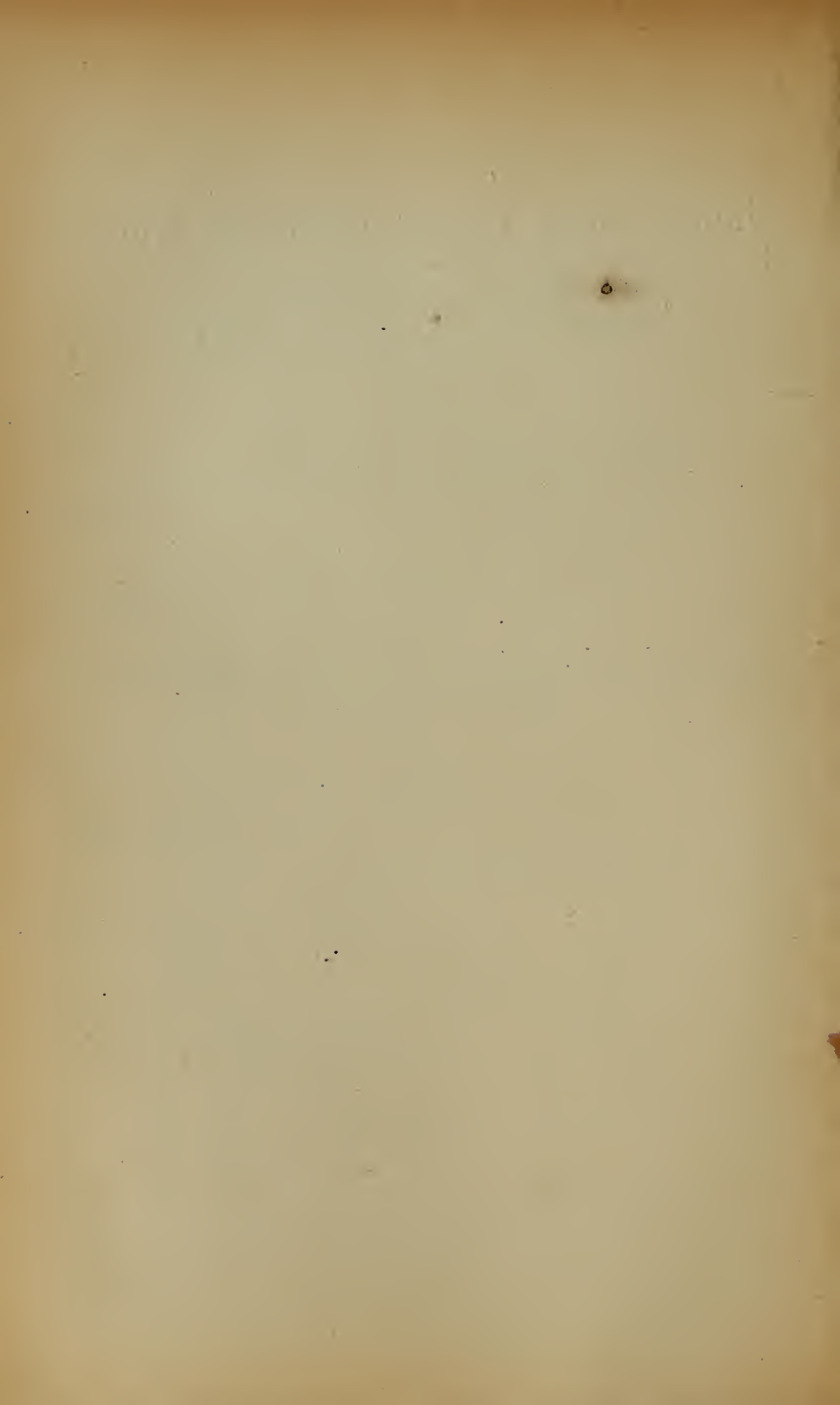
C. W. CANNON, *et al.*,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR
THE DISTRICT OF MONTANA.

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1 In the Circuit Court of the United States, for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD CO., Plaintiff.

v's.

CHARLES W. CANNON, CATHERINE B. CANNON, HENRY CANNON
and the CITY OF HELENA, Defendants. }

To the above named defendants, Charles W. Cannon, Catherine B. Cannon, Henry Cannon, and the City of Helena:

You, and each of you, are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the nineteenth day of May, in the year of our Lord one thousand eight hundred and ninety-two, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States, for the Ninth Circuit, District of Montana, wherein the Northern Pacific Railroad Company is appellant, and the said Charles W. Cannon, Catherine B. Cannon, Henry Cannon and the City of Helena, are respondents, to show cause, if any there be, why the judgment in said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

(Signed.) HIRAM KNOWLES,
U. S. District Judge.

[SEAL.]

Service of within citation accepted and copy received this 19th day of April, A. D. 1892.

TOOLE & WALLACE and
MASSENA BULLARD,
Attorneys for Defendants, C. W. Cannon, Catherine B. Cannon
and Henry Cannon.

ARTHUR J. CRAVEN,
Attorney for Defendant the City of Helena.

2 The answer of the Judges of the Circuit Court of the United States for the District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made therein, with all things touching the same, we, certify under the seal of our said court to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained; in a certain schedule to this writ annexed as within we are commanded.

By the Court: GEO. W. SPROULE,

[SEAL.]

Clerk.

3 Pleas in the Circuit Court of the United States for the District of Montana, held at the United States court room in the city of Helena, in the district aforesaid, before the Hon. Hiram Knowles, United States District Judge for the District of Montana, sitting as one of the judges of the Circuit Court of the United States for the Ninth Judicial Circuit, on Tuesday the 19th, day of April, A. D. 1892, in the April term of said court, in the year of our Lord One thousand eight hundred and ninety two, and of our Independence the one hundred and sixteenth year.

GEO. W. SPROULE, Clerk.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,

vs.

CHARLES W. CANNON, CATHERINE B. CANNON, HENRY CANNON,
and the CITY OF HELENA, Defendants. }

Be it remembered, that on the 5th day of October, 1891, came the complaint by its solicitors F. M. Dudley, Cullen, Sanders and Shelton, and filed in the office of the clerk of the Circuit Court of the United States, for the district of Montana, at Helena, in said District, their Bill of Complaint in said above entitled cause; which said Bill of Complaint is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the Ninth Circuit,
District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,

v's.

4 CHARLES W. CANNON, CATHERINE B. CANNON, HENRY CANNON and the CITY OF HELENA, Defendants. }

To the Honorable the Judges of the Circuit Court of the United States, for the District of Montana:

The Northern Pacific Railroad Company, a corporation created by, and organized and existing under an act of the Congress of the United States, approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern route," and those certain acts and joint resolutions supplemental thereto, and amendatory thereof, brings this its bill of complaint against Charles W. Cannon, Catherine B. Cannon, Henry Cannon and the City of Helena, a municipal corporation, created by, and existing under and by virtue of an act of the Legislature of the territory of Montana, (now state of Montana,) approved February 22, 1891, entitled "An act to incorporate the City of Helena" and the acts amendatory thereof, who are each and all of them citizens of the state of Montana.

And thereupon your orator complains and says that by the terms of said acts of congress, approved July 2, 1864, under which your orator was organized your orator was authorized to lay out, locate, construct, finish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the state Minnesota or Wisconsin, thence in a westerly direction by the most eligible route as should be determined by your orator within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, in the state of Washington; and there was granted to your orator under and by the terms of said act of congress, every alternate section of public land, not mineral, designated by odd numbers to the amount of
5 twenty alternate sections per mile on each side of said rail-

road line, as your orator might adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said line whenever it passed through any state, and whenever on the line thereof the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption and other claims or rights, at the time the line of said railroad should be definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office of the United States.

And your orator further shows that in and by said act it was further provided that whenever your orator should have twenty-five consecutive miles of any portion of its said railroad and telegraph line completed, the President of the United States should appoint three commissioners to examine the same, and if it appeared to said commissioners that said twenty-five miles of said railroad and telegraph line had been completed in a good and substantial manner as required by said act, the commissioners should so report to the President, and that thereupon patents for the lands as aforesaid should be issued to your orator confirming to it the right and title to said lands opposite to and coterminous with said completed section of said road, and from time to time whenever twenty-five consecutive miles should be constructed and completed as aforesaid, examined and accepted by said commissioners, the President of the United States should cause patents to be issued to your orator for the lands opposite to said completed section so granted to your orator, as aforesaid.

And your orator further shows that it was provided in and by said act that the President of the United States should cause the lands to be surveyed for forty miles in width on
6 both sides of the entire line of said road, after the general route thereof was fixed, and as fast as should be required by the construction of said railroad, and that the odd sections of land thereby granted should not thereafter be liable to sale, entry or pre-emption, before or after they were surveyed, except by your orator as provided in said act.

And your orator further shows that your orator duly accepted the

terms, conditions and impositions of said act, by causing an acceptance thereof in writing, under the corporate seal of your orator, executed pursuant to the direction of its board of directors, first had and obtained, and the serving of such acceptance upon the President of the United States, within two years after the date of the passage of said act; and your orator on the 21st day of February, 1872, duly filed in the office of the Secretary of the Interior of the United States, a map showing the general route of your orators said railroad, extending through and beyond the State (then Territory) of Montana, and that thereafter, to-wit, on the 21st day of February, 1872, the said Secretary of the Interior duly approved said map, and transmitted the same to the commissioner of the General Land Office of the United States, where the same was duly filed on the day last aforesaid, and yet remains on file and of record in said office.

And your orator further shows that at the date last aforesaid, the north-west quarter of section twenty-five of township numbered ten, north of range four west of the principal meridian of Montana, was on and within forty miles of the general route of your orator's said railroad, as shown on said map, and that on the date last aforesaid, to-wit, on the said 21st day of February, 1872, the said tract, and the whole thereof was public land of the United States, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption and other claims and rights.

7 And your orator further shows that upon the filing of the said map of general route in the office of the Commissioner of the General Land Office, as aforesaid, there was transmitted by the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, a diagram thereof showing the lateral or side limits, to include all lands on and within the said forty miles of general route, to the register and receiver of the said United States Local Land Office, at Helena, Montana, together with an order from the said Commissioner, to the said register and receiver of the said Land Office, to withdraw from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed

odd numbered sections of public land falling within the limits of forty miles, as designated on said diagram; and that hereafter to-wit, on the 6th day of May, 1872, said diagram and order were received by said register and receiver, and duly filed in said office at Helena, Montana, where the same thereafter, and now are, of record, and said order of reservation has never been revoked or recalled. That in and by said diagram, it appears that the said north-west quarter of section 25, aforesaid, was within the limits of said diagram, and within the limits of the said lands so withdrawn from sale, or location, pre-emption or homestead entry.

And your orator further shows that on or about the month of March, 1868, all of the lands of said township numbered ten north of range four west of the principal meridian of Montana, were surveyed by and under the direction of the Surveyor General, for the District of Montana, and thereafter, to-wit on the day of

1868, the said United States Surveyor General, made return of the official plat of said survey, and filed the same in the office of the Commissioner of the General Land Office, at Washington, D. C. which said survey and official plat thereof after having been approved by the Commissioner of the General Land Office, as

aforesaid, was regularly filed in the United States District
8 Land Office, at Helena, Montana, and the same yet remains
a record in said office. That in and by said survey of said

township, it was ascertained and determined that the said north-west quarter of said section 25, township and range aforesaid, was agricultural land, and not mineral in character, and the same was so returned as agricultural land, which said adjudication and determination of the character of said land, have since continued, and yet are, in full force and effect.

And your orator further shows that thereafter, to-wit on the 6th day of July, 1882, your orator having definitely fixed the line of its said railroad, extending opposite to and past said north-west quarter of the said section 25, duly caused a plat of said line so definitely fixed to be filed in the office of the Commissioner of the General Land Office of the United States, and thereby it was ascertained and determined that the said tract of land was within forty miles,

to-wit, within one mile of the line of your orator's said railroad, as so definitely fixed and adopted by your orator, and as determined by the filing of the map of definite location aforesaid.

And your orator further shows that it thereafter duly constructed and completed that portion of its said railroad and telegraph line, extending on, over and along the line of its definite location so fixed as aforesaid, and thereupon the President of the United States appointed three commissioners to examine the same, and it being made to appear to said commissioners that your orators said railroad and telegraph line had been completed, in a good, substantial and workmanlike manner, as in all respects required by said act of Congress, and the acts supplemental thereto, and amendatory thereof, the Commissioners so reported to the President of the United States, and the President of the United States duly accepted your orator's said railroad and telegraph line so completed as aforesaid, and the portion thereof perpendicular to the said north-west quarter of 9 said section twenty-five, and the same was so constructed, completed, and accepted as aforesaid, on or about the 7th day of September, A. D. 1883.

And your orator further shows that at the date of its grant aforesaid, and at the date of the filing of its map of general route, and also at the date of the filing of its map of definite location as aforesaid, the said north-west quarter of said section 25, was not known to be mineral land, and the same was then, and yet is in fact and in truth, agricultural land, and did not, and does not contain mineral in sufficient quantities to make it valuable for mining purposes. Wherefore by reason of all of said acts and things, your orator became, and yet is, seized of a fee simple title in and to said north-west quarter of section numbered 25, in the township and range aforesaid, and ever since has been, and yet is, so the owner thereof in fee simple absolute, and is in the actual possession of the whole and every part thereof which said tract of land your petitioner has enclosed by a good and substantial fence

And your orator further shows that now, so it is, that heretofore to-wit, the above named defendant Charles W. Cannon, Catherine B. Cannon and Henry Cannon, intending and contriving to defraud

your orator of the said north-west quarter of said section numbered 25, and intending and contriving wrongfully and fraudulently to acquire title thereto from the United States, and to prevent the issuance of patent thereto, to your orator, did, on or about the 28th day of August, 1878, apply to the United States Local Land Officers, at Helena, Montana, that being the land district in which the said premises are situate, to purchase the said tract as mineral land, falsely and fraudulently claiming and pretending to said officers that said land was mineral land of the 10 United States, containing precious metals in such quantities as that it would pay to work the same as mineral land, and that the same was more valuable for mineral than agricultural, or other purposes, the said defendants then and there well knowing that the said land was not, and is not, mineral land, but that the same was agricultural land, not subject to location or entry under the laws of the United States, regulating the location and entry of mineral lands, and well knowing that the said land had been theretofore, and was then, reserved and appropriated for the benefit of your orator.

And your orator further shows that said defendants in pursuance of their said wrongful and fraudulent purpose, filed in the said United States Local Land Office, at Helena, Montana, certain affidavits and proofs, whereby they caused it to appear to the register and receiver of the said Local Land Office, and the officers of the Land Department of the United States that they had held and worked the said premises in compliance with the mining laws of the United States, and of the Territory of Montana, and with the rules and customs of miners, in force in the district wherein said premises were situate; that they had expended thereon in labor and improvements, at least five hundred dollars; and your orator upon its information and belief alleges, that said affidavits and proofs were wholly false and untrue, and were so made and filed for the purpose of deceiving and imposing upon the said register and receiver of the said Land Office, and the officers of the Land Department of the United States, and the said officers of the Local Land Office of the United States, at Helena, Montana, and the officers

of the United States Land department were thereby imposed upon and deceived; that in truth and in fact the said defendants had not worked upon said premises in conformity with the mining laws of the United States, or of Montana territory, or with the rules and customs of miners, or at
11 all, and had not discovered upon said premises, mines of any character or description whatsoever, or upon any part thereof, and had not expended the sum of five hundred dollars in labor or improvements upon said lands or at all.

And your orator further shows, that notwithstanding said land had been reserved as aforesaid, and withdrawn for the benefit of your orator, and your orator had a claim thereto of record in the said United States District Land Office, as aforesaid, of which said defendants had then and there full knowledge the said defendants seeking to deceive your orator and to conceal from your orator all knowledge of their fraudulent claim to said land, did not serve upon your orator, either in person or by publication, any notice of their said fraudulent claim that said lands were mineral, and not agricultural in character, and did not institute or commence any contest or other proceedings against your orator, wherein and whereby the character of said land might be determined; and the said register and receiver of the said United States District Land Office, at Helena, Montana, aforesaid, being deceived and misled as aforesaid by the said fraudulent affidavits and proofs offered by said defendants, did wrongfully and unlawfully fail and neglect to notify your orator of said adverse claim by said defendants, and did neglect to require proof, that notice, either personal or by publication of such adverse claim, had been given to your orator.

And your orator further shows that personal service during all of said times could have been made upon your orator of such proceedings and claims, but that no such notice was given, and your orator had no notice or knowledge of said proceedings in said Land Office, or of any claim upon the part of said defendants, or any or either of them, that said land was mineral in character or that said defendants or either of them, or any one adverse to your orator, had or pretended to have, any claim to said premises, until long after

the making of said application by said defendants.

12 And your orator further shows upon its information and belief that the said defendants Charles W. Cannon, Catherine B. Cannon, and Henry Cannon, did not, nor did any one in their behalf, at the time of making such application to purchase said lands, or at any time, offer any testimony or evidence whatsoever, showing or tending to show, that said land was mineral in character, subject to location or entry under and by virtue of the mining laws of the United States; but that said Register and receiver of said Land Office, being imposed upon and deceived by said fraudulent affidavits as aforesaid, and without any evidence showing, or tending to show that said land was mineral land, or that the surveyors adjudication thereof as agricultural land was untrue, did, on or about the said 28th day of August, 1878, wrongfully permit the said defendants to pay for said land, and did execute and deliver to them a receipt for the purchase price of the same as placer mining land, which said receipt purported to entitle the said defendants to a patent for said land; and thereafter and on or about the 17th day of August, 1879, the said defendants, upon presenting said certificate so wrongfully and fraudulently obtained by them, as aforesaid, obtained from the Land Department of the United States mineral patent No. 3468, purporting to convey to them the premises aforesaid, and the whole thereof.

And your orator further shows that the said pretended patent so issued as aforesaid, was issued negligently, wrongfully and without authority of law; and that the same was procured by the wrongful and fraudulent acts of the said defendants, but that said defendants have ever since pretended, and yet pretend, that the said patent was lawfully issued to them as aforesaid, and that it conveyed to them the said north west quarter of said section 25; and your orator further says that said patent constitutes a cloud upon the title
13 of your orator in and to said premises and to the whole and every part thereof.

And your orator further shows that thereafter, and on or about the day of A. D. 1887, the said Charles W. Cannon, Catherine B. Cannon

and Henry Cannon falsely pretended to be the owners and proprietors of said premises, and caused the same to be surveyed into lots, blocks, streets and alleys, as an addition to the city of Helena, and caused to be made a plat or map thereof, designating such lots, blocks, streets and alleys with their boundaries, as required by law, and acknowledged the same before an officer duly authorized to take acknowledgments of deeds, and thereupon they caused a copy of said plat to be filed in the office of the County Clerk and Recorder of the County of Lewis and Clark, State of Montana, wherein the said premises are situated, and the said defendants caused the said map or *palt* [plat] to be filed and recorded in said county of Lewis and Clarke, whereby and by reason of said survey and the filing of said plat as aforesaid, the said defendant, the City of Helena, claims to have some right, title or interest in and to so much of the said premises as is on said plat designated as streets and alleys, of said addition to the townsite of Helena, but that said claim is void and invalid as against this plaintiff.

And your orator further shows that the said premises are of great value to-wit, of the value of fifty thousand dollars; and that for your orator's wrongs and grievances hereinbefore set forth, it has no plain, speedy or adequate remedy at law.

Wherefore may it please your Honors to grant unto your Orator, a writ of subpoena of the United States of America, directed to the said Charles W. Cannon, Catherine B Cannon and Henry Cannon and the City of Helena, commanding them, and each of them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience, and that the defendant's and each of them,
14 be required to show, if they can, why your orator should not have the relief hereinafter prayed; and that they and each of them be required to make a full disclosure and discovery of all the matters according to the best and utmost of their knowledge, remembrance, information and belief, making a full, direct and perfect answer to the matters hereinbefore stated and charged, but not under oath (an answer under oath being hereby expressly waived);

that in and by the order of decree of this court in this behalf made, your orator be adjudged and decreed to have a full and perfect title in and to the said premises, and the whole thereof, and that the said patent so issued to the said defendants Charles W. Cannon, Catherine B. Cannon and Henry Cannon as aforesaid, and their pretended ownership and claim to the said premises, under and by virtue thereof, and the pretended claim of ownership or right to the possession of so much of said premises as are described in the plat thereof as streets and alleys, made on behalf of said City of Helena, be decreed to be null and void and that said defendants and each of them be hereafter enjoined and restrained from asserting any claim whatever in and to said premises, or any part thereof, adverse to your orator, and that your orator may have such other and further relief in the premises as may be in accordance with equity and good conscience.

F. M. DUDLEY, and
 CULLEN, SANDERS & SHELTON,
 Solicitors for Complainant.

Endorsed: In the Circuit Court of the United States for the Ninth Circuit, District of Montana, Nor. Pac. R. R. Co. Plaintiff, vs. C. W. Cannon, et al., Defendants. Bill of complaint. Filed Oct. 5, 1891, Geo. W. Sproule, Clerk. Cullen, Sanders and Shelton, Attorneys for Plaintiff.

And thereafter, on the 5th day of October, 1891, there issued out of said clerk's office a writ of subpoena in said entitled cause, 15 which said writ, together with the return of the marshal thereon endorsed is in the words and figures following, to-wit:

United States of America, Circuit court of the United States, Ninth
 • Judicial Circuit, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting: To Charles W. Cannon, Catherine B. Cannon, Henry Cannon and the City of Helena, You are hereby commanded, that you be and

appear in said Circuit Court of the United States, aforesaid, at the court room in Helena, on the 2nd day of November, A. D. 1891, to answer a Bill of Complaint exhibited against you in said court by Northern Pacific Railroad Company, who is a corporation created by, and organized and existing under an act of Congress of the United States, approved July 2nd, 1864, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 5th day of October in the year of our Lord, one thousand eight hundred and ninety-one, and of our Independence the 115th.

[SEAL.]

GEO. W. SPROULE,
Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of November next at the Clerk's Office of said court, pursuant to said Bill: otherwise
16 the said bill will be taken pro confesso.

GEO. W. SPROULE,
Clerk.

Endorsed: United States' Marshall's Office District of Montana. I hereby certify that I received the within writ on the 6th day of October 1891, and personally served the same on the 6th day of October 1891, by delivering to and leaving with the said Charles W. Cannon, Catherine B. Cannon and T. H. Kleinschmidt, Mayor of the City of Helena, said defendants named therein personally at the county of Lewis and Clarke in said District. an attached copy thereof; and after doing diligent search have been unable to find defendant Henry Cannon, in dist of Montana. WM. F. FURAY U. S. Marshall By JAS. B. ALLISON, Deputy, Helena, November 4, 1891.

Endorsed—No. 163—U. S. Circuit Court Ninth Circuit, District of Montana. In Equity. Northern Pacific Railroad Co. *vs.* C. W. Cannon, et al. Subpœna. Filed Nov. 4, 1891, GEO. W. SPROULE, Clerk.

And afterwards to-wit, on the 26th day of October 1891, came the complainant herein and filed its amendment to its complaint herein, which said amendment is in words and figures as following, to-wit:

In the Circuit Court of the United States, for the Ninth Circuit,
District of Montana.

	NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff	}
	<i>vs.</i>	
17	CHARLES W. CANNON, CATHERINE B. CANNON, HENRY CANNON AND THE CITY OF HELENA, Defendants.	

To the Honorable the Judges of the Circuit Court of the United States, for the Ninth Circuit, District of Montana.

Now at this time, and before any copy of the bill has been taken out of the clerk's office in the above entitled action comes your orator and files this amendment to its prayer in said bill, that is to say:

After the word "void" in line (5) five of page fifteen (15) of said bill, strike out all of the remainder of said prayer, and insert in lieu thereof, the following, to-wit:

And your orator further prays that a provisional or preliminary injunction be issued, restraining the said defendants, their agents, officers, attorneys, servants and employes and each and every of them from taking possession of said premises, or any part or portion thereof, under the said pretended patent therefor, issued to the said defendants Charles W. Cannon, Catherine B. Cannon and Henry Cannon, and from interfering by suits at law, or otherwise, or in any other way or manner whatever with the possession of said premises by this plaintiff until the final determination of this cause, and that upon said final hearing the said injunction may be made

perpetual; and that your orator have such other and further relief in the premises as may be in accordance with equity and good conscience.

F. M. DUDLEY, and
CULLEN, SANDERS & SHELTON,
Solicitors for Plaintiff.

Endorsed:—No. 163.—In the Circuit Court of the United States, for the Ninth Circuit, District of Montana. N. P. R. R. Co., Plaintiff vs. C. W. Cannon, et al Defendants. Amendment to Complaint. Filed Oct. 26th, 1891. Geo. W. Sproule, Clerk. Cullen, Sanders and Shelton, Attorneys for Plff.

18 And afterwards to-wit on the 2nd day of November, 1891, upon a praecipe being filed therefor, the appearance said defendant The City of Helena, and that of Arthur J. Craven as its attorney was entered in said entitled cause; which said appearance is in the words and figures following, to-wit:

In the Circuit Court of the United States, of the 9th Judicial Circuit, in and for the District of Montana.

No. 163—NORTHERN PACIFIC RAILROAD Co. }
vs. }
C. W. CANNON, *et al.* }

The appearance of the defendant The City of Helena in the above entitled action, and that of Arthur J. Craven as its Solicitor, is hereby entered this 2nd day of November, A. D. 1891.

GEO. W. SPROULE, Clerk.

And afterwards to-wit—on the said 2nd day of November, A. D., 1891, the appearance of the defendants Charles W. Cannon, Catherine B. Cannon and Henry Cannon, and of Messrs. Toole and Wallace, and McConnell and Clayberg, as their solicitors was duly entered in said entitled cause; which said appearance is in the words and figures following, to-wit:

In the Circuit Court of the United States, of the 9th Judicial Circuit, in and for the District of Montana.

No. 163—NORTHERN PACIFIC RAILROAD CO.

vs.

C. W. CANNON, *et al.*

The appearance of defendants Charles W. Cannon, Catherine B. Cannon, and Henry Cannon, and of Messrs. Toole & Wallace and McConnell and Clayberg as their solicitors is hereby entered this 2nd day of November, A. D. 1891.

GEO. W. SPROULE, Clerk.

And afterwards to-wit; on the 10th day of December, A. D. 1891, came the defendants Charles W. Cannon, Catherine B. Cannon and Henry Cannon, by their solicitors, and filed in said clerk's office their demurrer in said entitled cause; which said demurrer is in the words and figures following, to-wit:

In the United States Circuit Court, Ninth Circuit, In and for District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiffs

vs.

CHARLES W. CANNON, CATHERINE B. CANNON, HENRY CANNON
and the CITY OF HELENA. Defendants.

Now come the defendants Charles W. Cannon, Catherine B. Cannon and Henry Cannon, and interpose their demurrer to bill of complaint of plaintiff in above entitled action and as ground therefor show the following, to-wit:

I.—The court has no jurisdiction over this action of the parties thereto, it not appearing that the cause arose under the constitution of the United States, or laws of the United States, but upon alleged fraud of the so demurring defendants, and it not appearing that plaintiff is a citizen of a different state than these defendants.

II.—Said bill of complaint does not state facts sufficient to constitute a cause of action, and is insufficient in law in this to-wit:

First—It shows that the United States did not have full or any title to said land at the time the line of said road was definitely fixed and the plat thereof filed in the office of the commissioner of the General Land Office, but on the contrary thereof had conveyed such title to these demurring defendants.

Second—It shows that mineral lands were excepted from said grant, not withdrawn from entry, and that these demurring defendants had obtained a patent therefor under and in pursuance of the law applicable to the entry of such lands, that no adverse claim was interposed as required by law, and shows no legal or equitable
20 excuse for so doing, on account whereof any adverse claim plaintiff had was waived.

Third—The issuance of the patent mentioned is conclusive in this action that these demurring defendants complied with the law applicable to mineral lands and the entry thereof, that plaintiff having failed to interpose its adverse claim, if any, waived the same, and that the question of the mineral or non-mineral character of said lands thereby became one between these answering defendants and the government alone, and its determination is conclusive as to plaintiff, and can only be now questioned at the suit of the government.

Fourth—Said lands being excepted out of the grant and subject to entry, the patent so issued is conclusive evidence that they were mineral lands and entered in the mode prescribed by law, and plaintiff having waived its objection, if it had any to the issuance of a patent, cannot, in the absence of a fraud upon it, now be heard.

Fifth—Said bill of complaint alleged that said lands were withdrawn from entry at the time the patent was applied for and issued, thereby securing to plaintiff a plain, speedy and adequate remedy at law.

Sixth—Said bill of complaint does not show that any adverse claim was interposed in the Land Office, to the demurring defendants application for said patent, or offer any excuse therefor, by reason of which said Land Office allowed exclusive jurisdiction as to

the mineral or non mineral character of said lands, which and the patent, are conclusive of the questions here involved.

Seventh—Said plaintiff seeks to try the sole question of the mineral or non-mineral character of said lands which has been adjudicated in the manner provided by law as shown by the issuance of said patent.

Eighth—Said patent having been obtained in the manner provided by law, and no fraud being shown whereby plaintiff was prevented from contesting these demurring defendants rights there
21 to in the Land Office, this court cannot cause said lands to be conveyed to plaintiff without interfering with the right of Congress to dispose of the public domain.

Ninth—Said bill of complaint seeks equitable relief without showing any equitable grounds.

Tenth—The officers of the Land Office in the entry of mineral and non-mineral lands, after the monition was given allowed exclusive jurisdiction over the question here sought to be litigated.

Eleventh—Because by the Acts of Congress, public policy and equity and good conscience require that the question of the mineral or non-mineral character of said lands should be settled before patent is issued in the mode and no excuse is offered for not causing the same to be done.

Twelfth—Said bill of complaint shows that if said lands were withdrawn from entry, it was the beneficiary in such withdrawal, and that by showing the same to be non-mineral it could have defeated the entry of these demurring defendants, although it might not at the time be entitled to a patent, and offers no excuse for not doing so and consequently has no equitable standing.

Thirteenth—It must be assumed to maintain this action against these demurring defendants as trustees that the legal title of the government passed to them by the patent and that consequently said lands were not withdrawn from entry and that the United States did not have full title at the time of fixing the definite line and filing the plat which defeats plaintiffs claim under said grant. For

that if the legal title passed by the patent plaintiff was not a beneficiary under the grant at the time the definite line was fixed and plat filed, and consequently have no standing in this court.

Fourteenth—Said bill of complaint shows that the general route of the road was fixed in 1871, and the said grant and acts of Congress applicable to the mineral lands of the United States show that the same was subject to entry in the mode provided and that the mineral or non-mineral character thereof was not left open
22 for determination after patents therefor.

III.

Said bill of complaint shows that plaintiff was guilty of gross laches in not sooner instituting its action and seeking the relief prayed for.

IV.

Said bill of complaint shows that the plaintiffs action is barred by sections 29, 30, 31 and 32, Chapter 2, and section 42, chapter 3, title 3, of the Code of Civil Procedure of this state, and the statutes thereof applicable to limitations of actions.

V.

Said bill of complaint shows that the patent was issued to plaintiff in 1879, and does not aver a want of knowledge of such fact, or notice thereof, and avers only upon information and belief, that it did not know or learn of the fraud or false swearing until within two years next preceding the commencement of this action, which is insufficient under said Statutes of Limitations to toll the same.

McCONNELL and CLAYBERG, &
TOOLE and WALLACE,

Of Solicitors for Defendants Demurring.

We hereby certify that the foregoing demurrer is in our opinion well grounded in law.

McCONNELL and CLAYBERG, &
TOOLE and WALLACE,

Of Solicitors for Demurring Defendants.

Receipt of copy of above acknowledged this 10th day of December, 1891.

CULLEN, SANDERS and SHELTON,
Of Solicitors for Plffts.

Endorsed—No. 163—Circuit Court of the U. S. 9th Circuit,
23 District of Montana. Northern Pacific R. R. Co. Plaintiff
vs. C. W. Cannon, *et al.* Defendants, Demurrer. Filed Decr.
10th 1891, Geo. W. Sproule, Clerk, by W. J. Kennedy, Depty-
Toole and Wallace, Attorneys for Defendants.

And afterwards to-wit, on the 14th day of December A. D. 1891,
the plaintiff herein by its solicitors set down the demurrer of said
defendants to be argued on the 4th day of January A. D. 1892.

And afterwards, to-wit, on the 4th day of January A. D. 1892,
in the November term of said court 1891, in the recrd of the pro-
ceedings thereof in said entitled cause, before Hon. Hiram Knowles,
district judge, is the following entry, to-wit:

Forty Second Day, November term A. D. 1891, Monday, January
4th, 1892.

No. 163—NORTHERN PACIFIC R. R. Co.,
vs.
C. W. CANNON, *et al.*,

Hearing of demurrer ordered passed until called up.

And afterwards, to-wit, on the 5th day of April A. D. 1892, in
the April term of said court, 1892, in the record of the pro-
ceedings thereof in said cause before Hon. Hiram Knowles, district
judge, is the following entry, to-wit:

2nd day April term A. D. 1892: Tuesday April 5th, 1892. 10 A. M.

No. 163—NORTHERN PACIFIC RAILROAD CO.
vs.
C. W. CANNON, *et al.*

Counsel for respective parties being present;
Demurrer submitted to the court for consideration and decision,

and after due consideration it is ordered that said demurrer be and the same hereby is sustained; to which ruling of the court plaintiff then and there by its counsel duly excepted and said exception allowed. And the plaintiff thereupon electing to abide by its complaint and declining to amend, on motion of counsel for defendants therein decree ordered entered in favor of said defendants dismissing said bill of complaint.

And afterwards, to-wit, on the 18th day of April A. D. 1892, 24 in the April term, 1892 of said court, in the record of the proceedings thereof in said entitled cause, before Hon. Hiram Knowles, district judge, is the following entry, to-wit:

In the Circuit Court of the United States, Ninth Circuit District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,	}
<i>vs.</i>	
CHARLES W. CANNON, CATHERINE B. CANNON, HENRY CANNON, and the CITY OF HELENA, Defendants.	

Be it remembered that on the 4th day of April, A. D. 1892, the demurrer of the defendants Charles W. Cannon, Catherine B. Cannon and Henry Cannon to the complaint of said complainant, filed on the 5th day of October, 1891, and the amendment thereto filed on the 26th day of October, 1891, coming on to be heard, the same was sustained by the court, and the said plaintiff asking no leave to amend but standing upon its said complaint and amendment thereto, it is therefore ordered, adjudged and decreed that the said plaintiff have and take nothing by its said complaint and amendment thereto, and the said defendants Charles W. Cannon, Catherine B. Cannon and Henry Cannon, have and recover of and from the said plaintiff their costs in this behalf expended.

Dated this 18 day of April, A. D. 1892.

HIRAM KNOWLES,
Judge of said Court.

Endorsed:—No. 163.—In the Circuit Court of the United States Ninth Circuit. District of Montana, Northern Pacific R. R. Co. vs.

C. W. Cannon, et al. Decree. Filed and entered this 18th day of April, 1892. Geo. W. Sproule, Clerk.

25 And afterwards, to-wit, on the 19th day of April, A. D. 1892, in the April term of said court, 1892, in the record of the proceedings thereof in said entitled cause, before Hon. Hiram Knowles, district judge, is the following entry, to-wit: 8th day April term A. D. 1892; Tuesday April 19th, 1892, 10 A. M.

No. 163.—NORTHERN PACIFIC RAILROAD COMPANY,
vs.
 C. W. CANNON, *et al.* }

On motion of solicitors for complainant, bond on appeal herein fixed in the sum of \$500; and thereupon complainant presented its petition for an appeal herein; which appeal was thereupon allowed, and complainant thereupon filed its assignment of errors herein.

And afterward at said time said complainant filed its petition for an appeal herein which said petition is in the words and figures as follows, to-wit:

26 United States Circuit Court, For the District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant
vs.
 CHARLES W. CANNON, CATHARINE B. CANNON, HENRY CANNON,
 and the CITY OF HELENA, Defendants. }

The above named complainant, NORTHERN PACIFIC RAILROAD COMPANY, conceiving itself aggrieved by the final decree in the above entitled cause entered April 18, 1892, at the April term of said court, doth hereby appeal from said final decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this, its said appeal may be allowed; that a transcript of the record, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit; and that the proper orders touching the security required of it may be made.

FRED. M. DUDLEY,
 Attorney for Complainant and Appellant.

Now to-wit, April 19, 1892, it is ordered that the appeal be allowed, as prayed for.

HIRAM KNOWLES,
U. S. District Judge.

Endorsed: in the Circuit Court of the United States, Ninth Circuit, District of Montana.—No. 163—Nor. Pac. R. R. Co. *vs.* C. W. Cannon et al. Petition for Appeal. Filed April 19th 1892. GEO. W. SPROULE, Clerk.

27 And at said time complainant filed its assignment of errors in said entitled cause; which said assignment of errors is in the words and figures as follows, to-wit:

United States Circuit Court, for the District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,

vs.

CHARLES W. CANNON, CATHARINE B. CANNON, HENRY CANNON
and the CITY OF HELENA, Defendants. }

ASSIGNMENT OF ERRORS.

Now comes the complainant, the Northern Pacific Railroad Company, by its attorneys, and says that in the records and proceedings in the above entitled cause in said United States Circuit Court for the District of Montana, there is manifest error as follows, to-wit:

I.

That the said court held that complainant's said bill did not show that complainant was entitled to the relief prayed for in said bill against said defendants, or either of them, or any relief of any kind.

II.

The said court held that it appeared from complainant's own showing that it was not entitled to the relief prayed for in said bill against said defendants.

III.

That the said United States Circuit Court for the Dis-

28 trict of Montana finding and perceiving that said complainant had duly complied with all the terms, conditions and impositions of the act of congress approved July 2, 1864; and further finding and perceiving that the said complainant had duly fixed the line of general route of its road extending through the State (then Territory) of Montana by filing a plat thereof, duly approved by the secretary of the interior, in the office of the commissioner of the general land office, February 21, 1872; and further finding that at said date the northwest quarter (N W $\frac{1}{4}$) of section twenty-five (25) township ten (10) north, of range four (4) west, Principal Meridian of Montana, was on and within forty miles of such line of general route, so fixed as aforesaid, and was, on said day, non-mineral public land of the United States to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights; and further finding that upon the filing of such map of general route in the office of the commissioner of the general land office, said commissioner, acting under the direction of the secretary of the interior, transmitted a diagram, showing the lateral, or side limits, to include all lands on and within said forty miles of said general route, to the register and receiver of the United States district land office at Helena, Montana, together with an order to such register and receiver to withdraw from sale, location, pre-emption or homestead entry, all the surveyed and unsurveyed odd numbered sections falling within the limits of forty miles as designated on said diagram; and further finding that the said order and diagram were duly received by said register and receiver, and duly filed in the land office at Helena, Montana, on the 6th day

29 of May, 1872, and that said land was, and is, within said district, nevertheless did determine, adjudge and decree that a fraudulent and void claim to said land, made under the laws of the United States authorizing the location and patenting of mineral lands, and by virtue of a certain patent for said land issued by the United States to said defendants, as mineral land, existing July 6, 1882, at the time the complainant definitely located the line of its road and fixed the same by filing a plat thereof in the office of

the commissioner of the general land office, constitute a claim or right sufficient to exclude the land from the grant to complainant by said act of congress approved July 2, 1864. although such claim was created subsequent to the reservation of said land for complainant as aforesaid, and although the said land was on and within forty miles of the line of complainant's road, so definitely fixed as aforesaid.

IV.

The said court failed and declined to hold that it appeared from said bill that the legal title to said land was vested in complainant by virtue of said act of congress approved July 2, 1864; and the acceptance of and compliance with the terms and provisions thereof by said complainant as in said bill set forth.

V.

The said court failed and declined to hold that the said patent in said bill referred to, issued to said defendants, and their claims thereunder, are fraudulent and void, and
30 constitute and are a cloud upon complainant's title to said land.

Wherefore the said Northern Pacific Railroad Company prays that the decree of said United States Circuit Court for the District of Montana, in the above cause heretofore entered, to-wit, April 18th, 1892, dismissing complainant's said bill, be reversed; and that said court be directed to enter an order overruling said demurrer and directing said defendants to answer complainant's said bill, as in said bill prayed.

FRED M. DUDLEY,
Attorney for Complainant.

Endorsed: In the Circuit Court of the United States, Ninth Circuit, District of Montana.—No. 163.—Nor. Pac. R.R.Co. *vs.* Chas. W. Cannon, *et al.* Assignment of Errors. Filed April 19, 1892.
Geo. W. Sproule, Clerk.

31 And afterwards, to-wit, on said 19th day of April A. D. 1892, in the April term of said court 1892, in the record of

the proceedings thereof in said entitled cause, before Hon. Hiram Knowles, district judge, is the following entry, to-wit:

No. 163—NORTHERN PACIFIC R. R. CO.

vs.

C. W. CANNON, *et al.*

Citation in said cause issued and bond approved and filed.

And thereupon said bond as approved was filed; which said bond is in the words and figures following, to-wit:

32 In the Circuit Court of the United States, for the Ninth Circuit District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,

vs.

CHARLES W. CANNON, CATHERINE B. CANNON, HENRY CANNON and the CITY OF HELENA, Defendants.

Know all men by these presents, that we the Northern Pacific Railroad Company, as principal, and S. T. Hauser and H. Barbour, of the city of Helena, State of Montana, as sureties are held and bound unto the above named Charles W. Cannon, Catherine B. Cannon, Henry Cannon and the City of Helena, in the penal sum of five hundred dollars lawful money of the United States, to be paid to the said Charles W. Cannon, Catherine B. Cannon, Henry Cannon and the city of Helena, for the payment of which well and truly to be made, we bind ourselves, each of us, our and each of our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated the nineteenth day of April, in the year of our Lord eighteen hundred and ninety two.

Whereas the above named, the Northern Pacific Railroad Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree rendered in the above entitled suit by the Judge of the Circuit Court of the United States, for the Ninth Circuit, District of Montana.

Now, therefore the condition of this obligation is such, that if the above named the Northern Pacific Railroad Company shall pros-

ecute said appeal to effect, and answer all damages and costs
 33 if it fail to make said appeal good, then this obligation shall be
 void, otherwise the same shall be and remain in full force
 and virtue.

NORTHERN PACIFIC RAILROAD CO.
 By CULLEN, SANDERS & SHELDON,
 Div. Counsel.

S. T. HAUSER.

H. BARBOUR.

Sealed, delivered and acknowledged this nineteenth day of April,
 A. D. eighteen hundred and ninety two, before me.

EDWARD W. KNIGHT, JR.

[SEAL.]

Notary Public.

Approved by:

HIRAM KNOWLES,
 U. S. Dist. Judge.

Endorsed: No. 163.—In the Circuit Court of the United States
 for the Ninth Circuit, District of Montana. Nor. Pac. R. R. Co.
 Plaintiff vs. Chas. W. Cannon. *et al* Defendants. Bond. Filed
 April 19, 1892. Geo. W. Sproule, Clerk. Cullen, Sanders and
 Shelton, Attorneys for Plaintiff.

34 UNITED STATES OF AMERICA, }
 District of Montana. } ss.

Circuit Court of the United States, Ninth Circuit, District of
 Montana.

I, George W. Sproule, clerk of *of* said Circuit Court, do hereby cer-
 tify and return to the honorable the United States Circuit Court of
 Appeals for the Ninth Circuit, that the foregoing volume consisting of
 34 pages numbered consecutively from 1 to 34 inclusive, it is a true
 and complete transcript of the records, pleadings, orders, decree and
 other proceedings in said entitled cause and of the whole thereof
 as the same appears from the original records and files of said court;
 and I do further certify and return that I have annexed to said

transcript and included within said paging the original citation with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, in the District of Montana, this 21st day of April A. D. 1892.

[SEAL]

GEO. W. SPROULE,
Clerk.